Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Market Entry and Regulation of Foreign-affiliated Entities	)	IB Docket No. 95-22
	)	RM-8355
	)	RM-8392

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COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in opposition to any liberalization of the Commission's treatment of Section 310(b)(4) of the Communications Act unless its net effect will be a substantial increase in the access of American minorities to financing for media ventures.

MMTC, founded in 1986, is the association of attorneys, scholars, engineers and economists which assists the civil rights community in communications policy matters. The views stated herein are those of MMTC itself and are not necessarily the views of any particular member of MMTC or its Board.

We respond specifically to the question of whether the Commission should incorporate an effective market access standard into the public interest determination it makes under Section 310(b)(4) in situations where the foreign ownership would exceed the 25% statutory benchmark. NPRM, FCC 95-53 (released February 17, 1995), ¶¶92, 99-106.

MMTC believes that the restrictions on alien ownership in Section 310 of the Act have served the public well and should be retained. Unlimited foreign capital invested in American broadcasting would eviscerate the public interest standard which has undergirded broadcast regulation for most of this century. In

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particular, repeal of Section 310(b) would literally permit the airwaves to be sold off to the highest bidder, destroying years of careful and thoughtful work in constructing the world's greatest system of broadcasting.

Furthermore, alien ownership in American media would make broadcast owners even more distant from viewers and listeners than many of them are now. Today, if a radio listener in Peoria thinks a local station's programming is harmful to her children, she can call the owner, whether the owner is in Peoria or in New York City. What if the owner is in Brussels or Berlin? In Teheran or Tripoli? In Osaka or Vladivostok?

In our system of broadcasting, the licensee is ultimately responsible for everything he broadcasts. The "buck stops" with the station owner. Because of that direct accountability, broadcasting has been freed even of indirect program content regulation, such as the Fairness Doctrine, ascertainment and program percentages.

The quality of our broadcast service is guaranteed by the Commission's very high standards for licensee character qualifications. Because there are far fewer radio and television licenses than there are people who want to own them, we have laws and regulations to insure that licensees are not felons, antitrust violators, race or sex discriminators, or drug dealers. We know that an American owned licensee has complied with American laws. But we have <u>no</u> realistic way of knowing whether alien broadcast owners have complied with the laws of their home countries -- laws which may be much more relaxed and easier to circumvent than American laws.

If the Commission undermines Section 310(b)(4) by adopting a concept of "effective market access", it should be careful to define that concept in clearly understood, objective and quantifiable terms.[1] Experience with the multiple ownership rules has demonstrated that the industry and the public alike benefit from having clear, unequivocal standards which can be applied with predictability and which minimize the likelihood that future commissions will render multiple inconsistent decisions or, worse yet, decisions based primarily on political factors rather than public interest factors. Compare U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956) (bright line test for national multiple ownership) with Amendment of §73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), 75 FCC2d 587 (1979), aff'd sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982) (Top 50 policy repealed after 23 consecutive waivers essentially eviscerated the policy).

A fuzzy standard is particularly inappropriate where its effect is the equitable vesting of rights. Once a broadcast assignment or transfer application is granted, the new owner is virtually impossible to displace, notwithstanding the "squatters rights" doctrine in Section 304 of the Act. Displacing foreign media owners will be particularly difficult if "takings" legislation makes it through the Congress.[2]

1/ There is one area in which some subjectivity may be unavoidable: insuring that the extent to which other countries provide the press freedoms we take for granted is approximately reciprocal with our own First Amendment jurisprudence. If a nation can coerce its media (including American entrants) to be used as instruments of state censorship, a fair question can be raised whether that nation's media companies should be allowed reciprocal access in the United States.

2/ Indeed, with the U.S. at war far too often and with future enemies hard to soothsay, even the original, albeit quaint, justification for Section 310 is not without value today. But even a statute whose original justification has largely evaporated may retain value for other reasons not contemplated upon its original enactment.

Furthermore, if "effective market access" is made a factor in Section 310(b)(4) public interest analysis, it should not be a major factor, especially for broadcasting. It is hard to understand how foreign owners of American broadcast stations would provide better service to the American public simply because their home countries allow Americans to own broadcast stations.[3/] Without a reasoned explanation of how American consumers would benefit, the Commission should not consider "effective market access" in Section 310(b)(4) analyses.

The most fundamental reason the Commission should eschew any major modifications of its Section 310(b)(4) jurisprudence is the profoundly adverse impact such modifications could have on the prospects for minority broadcast ownership. The FCC has not yet completed the task of insuring that all Americans have a chance to achieve ownership in America's most important industry.

Ten years ago, in Multiple Ownership Rules (Reconsideration), 100 FCC2d 74, 94-95 (1985) (history omitted), the Commission recognized that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership." That is equally true of the Commission's interpretation of the alien ownership restrictions in the Communications Act. Regrettably, the NPRM does not even mention the potential impact on minorities of liberalization of the Commission's treatment of Section 310(b)(4).

Hopefully the Commission's sensitivity to this issue has been heightened by recent developments in Congress. The possible repeal

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3/ Effective market access for broadcasting may be meaningless in practice, particularly in densely populated European countries whose broadcasting spectrum (like ours) is essentially fully licensed out and whose major broadcast facilities (unlike some of ours) have been closely held for decades and are unlikely to be transferred to foreigners or anyone else.

of the tax certificate policy, which has accounted for about 2/3 of all minority owned stations, represents substantial change in the regulatory landscape, compelling a reevaluation of preexisting policy. See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Reliance on minority ownership incentives to correct the inability of the unregulated marketplace to promote diversity has been an underlying assumption of deregulation.4/ With that assumption gone, the

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4/ Beginning almost immediately after it adopted the minority ownership policies, the Commission began systematically deregulating in every other substantive area except EEO: postcard renewals, ascertainment and program content percentage standards, the Fairness Doctrine, five year TV and seven year radio renewals, the duopoly rule, the Top 50 Policy, the 7-7-7 and the 12-12-12 rule, the Mickey Leland (14-14-14) rule, most distress sales (for want of stations placed in hearing), most comparative hearings for new facilities, and the AM clear channel eligibility criteria favoring minority ownership. For example, in Deregulation of Radio (NPRM), 73 FCC2d 457, 482 (1979), the Commission reassured the public that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry."

In adopting its ultimate rules in Deregulation of Radio, 84 FCC2d 968, 1036, recon. granted in part, 87 FCC2d 797 (1981) aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id. at 977.

See also Amendment of §73.636(a), 75 FCC2d at 599 (separate statement of Chairman Ferris); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 RR2d 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987); Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules, 102 FCC2d 548, 558 (1985), recon denied, 4 FCC Rcd 5218 (1989); Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels, 3 FCC Rcd 3597 (1988), recon. denied, 4 FCC Rcd 4711 (1989); cf. Revision of Radio Rules and Policies (Report and Order) (MM Docket 91-140), 7 FCC Rcd 2755, 2769-2770 ¶¶26-29 (1992) (relying on minority ownership policies to further diversification goals, even as the Commission deleted one of those policies, the Mickey Leland Rule.)

The D.C. Circuit has embraced this approach. See NAACP v. FCC, 682 F.2d at 1004 (holding that the Commission "has not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.")

Commission is obliged to develop compensatory measures.

The primary obstacle facing minorities seeking to break into media ownership is access to capital. Even when minorities took advantage of the (soon to be interred) tax certificate policy, they frequently could win a bidding war with nonminority competitors engorged with the ample resources of those sources of domestic capital which are seldom available to minorities.

Roughly 80% of the world's media and telecommunications investment capital is not American capital.[5/] Suppose virtually unlimited amounts of that 80% of the world's media and telecommunications investment capital could enter this country at will. If minorities and small broadcasters are forced to bid against alien as well as domestic capital, they will be swamped.

Virtually no foreign media equity or even foreign media debt finds its way into the hands of minorities. There are two principal reasons why.

First, alien media investment capital arrives in this country only in units too large for most minority deals. Unlike domestic investors, an alien investor typically lacks the knowledge and ability to monitor her investment closely. The administrative cost of managing an overseas investment is not materially greater for a $100 million investment than it is for a $1,000,000 investment. Consequently, alien funds are generally unavailable to small (and thus most minority) businesses.

5/ Aliens wishing to financially benefit from American media can do so now through debt rather than equity. Debt poses no regulatory problem for the Commission. Loans are freely sold worldwide without the knowledge of the Commission. The Commission tracks equity; it does not track debt. But equity, not debt, is where influence lies. Even noncontrolling equity holders always have greater exposure and decision making rights than creditors.

Second, alien fund managers and bankers seldom have experienced the culture and traditions -- much less the legal regime -- of civil rights. The Community Reinvestment Act does not apply overseas, nor do precepts against redlining and discrimination in lending. Even alien investors with the best of intentions have little to gain from the long term success of minority entrepreneurship in the United States. On the other hand, all Americans benefit when the minority sector of our economy is strong. Domestic investors, aware of these benefits, frequently act accordingly.[6/]

The Commission must avoid even the appearance of weakening its defense of minorities' ability to obtain meaningful access to capital and to use that capital competitively. Unlimited entry of aliens into American media ownership would virtually eviscerate the effectiveness of the Commission's few remaining minority ownership policies. It would be especially inequitable to American minorities to deny them a meaningful opportunity to buy broadcast stations as a consequence of a rulemaking which welcomes well-heeled Britons, Russians, and Germans to buy access to the American peoples' airwaves. The Commission should not force American minorities to the back of the line and allow wealthy foreigners -- simply because they have money -- to jump to the front of the line. As Americans, we simply need to put our own people first.

6/ Automotive sales is the largest sector of the minority owned business economy. The number of minority owned dealerships affiliated with American owned manufacturers far exceeds the number affiliated with foreign manufacturers of similar size. According to the National Association of Minority Automobile Dealers Resource Guide (1993-1994 edition), pp. 45-74, the number of minority owned dealers affiliated with the large American manufacturers are: Chrysler: 123; Ford: 170; and GM: 169 (plus 13 with Saturn). The number of minority owned dealers affiliated with similar sized foreign owned manufacturers are: Honda: 3; Nissan: 22; Toyota: 36; Volkswagen: 16. Obviously, foreign capital entering the U.S. in the automotive sector manifestly does not translate into minority ownership.

If some relaxation of Section 310(b)(4) is considered, MMTC respectfully offers four recommendations on how the Commission might cushion the impact on minorities and small businesses.

First, as the NPRM recognizes, we should not allow foreign access without meaningful reciprocity.

Second, any liberalization of the public interest analysis of potential waivers of Section 310(b)(4) should take place in a way which fosters minority ownership by addressing the longstanding, almost intractable problem of capital formation. For example, the Commission could permit up to 49% alien equity so long as it is invested in a minority controlled company.

Third, the Commission might consider permitting an alien who makes a substantial investment in a minority controlled broadcaster to hold a larger equity stake in that and other American media holdings than otherwise would be permissible.

Fourth, the Commission should formally ask Congress to create the American Communications Investment Bank as a vehicle to promote diversity in broadcasting through the use of alien investments. The Bank would be a private, nonpartisan institution, operated by Presidential appointees subject to Senate confirmation, much like Fannie Mae and Freddie Mac. The Bank would permit aliens (and others, including U.S. based multinationals) seeking to invest in U.S. media to channel and pool their investments for subsequent subdivision and targeting to U.S. media interests of all sizes, in furtherance of U.S. communications and trade policy.

The Bank would be designed to attract sufficient investment to greatly accelerate the construction of the information superhighway, generate additional tax revenue, and help balance the budget without raising taxes.

The Bank would promote minority ownership in five ways, providing minorities with capital to which they heretofore seldom had access:

1. Its investment decisions would include minority ownership as a primary decisional factor, accounting for at least 30% of the capital invested or loans made, subject to generally accepted prudent lending and investing criteria.

2. Capital flowing through the Bank would not be deemed attributable for the purpose of Section 310(b)(4) of the Act.

3. By its pooling mechanism, the Bank would reduce the transaction costs which prevent small and moderate sized amounts of alien capital from being invested in American media and thus ultimately being accessible by minorities.

4. By its subdistribution mechanism, the Bank would enable large sized amounts of alien capital to be broken down into the smaller sums minorities often require for broadcast acquisitions.

5. The Bank would have the flexibility to make investments, to make loans, or to issue loan guarantees, thus maximizing its ability to harness private sector resources to achieve its business and social objectives.

This is not "affirmative action." It is, instead, a workable means of assisting minorities to acquire the capital needed to compete in the marketplace.

The Commission should absolutely not consider repeal or liberalization of Section 310(b) <u>unless and until</u> a firm, workable and tested mechanism is created to guarantee that the net effect of additional alien ownership will be a dramatic <u>increase</u> in American minority ownership.

Diversity in broadcasting is like the rain forests -- once plowed under, it will never return. For four decades, as the industry grew, diversification grew. The resulting panoply of small business owners, including minorities, gave our airwaves the diversity of information which makes our system of broadcasting unique in the world. It would be a national tragedy, of immense proportion, if the Commission shuts the doors on minorities and small business owners forever, simply because it is dazzled by the glow of "globalization."

Respectfully submitted,

David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W.
Suite AG-58
Washington, D.C. 20010
(202) 332-0500

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